No. 20617

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

J. HOWARD ARNOLD — APPELLANT

vs.

WILLIAM J. McGUINESS — APPELLEE

APPELLANT'S OPENING BRIEF

Appeal from the
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

J. HOWARD ARNOLD
Postoffice Box 919
Berkeley 1, Calif.
APPELLANT, pro se

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JURISDICTIONAL BASIS

ii appeal is taken from a final judgment order of the United States isrict Court for the Northern District of California, Southern Division saining a motion to dismiss the action on the ground that the com- ant fails to state a claim upon which relief can be granted, under ul 12b(6), Federal Rules of Civil Procedure. Jurisdiction of this out is based on 28 U.S. Code Section 1291.

The District Court action sought to be dismissed on motion efendant is a damage suit for false imprisonment and other depriva- on of Federal rights, conspiring to commit such deprivations, and egecting to prevent such conspiracy.

Jurisdiction of the District Court was invoked under Title 3, U.S. Code, Sections 1331 and 1343(1), (2), (3), and (4), and under Title , J.S. Code, Sections 1981, 1982, 1983, 1985, and 1986, as well as under tle 11, U.S. Code, Sections 27, 711, 712, 742, and 743, together with cton 110 and other sections establishing the paramount and exclusive ridiction of the District Court in proceedings for arrangements with edtors under Chapter XI, Title 11, U.S. Code.

The only pleading thus far filed in the District Court is e Complaint, which appears on pp. 1 to 7, Clerk's Transcript.

STATEMENT OF THE CASE

ie cause of action in the damage suit arose in July, 1964, when the fedant, acting under color of his office as a judge of the Superior ur of the State of California, in and for the County of Alameda, on y 15, 1964, signed an Order to Show Cause in re Contempt directing pelant to appear on July 28, 1964, and, on July 29, 1964, found him in ntenpt for non-appearance July 28 and sentenced him to jail for 3 days.

On July 27, 1964, Appellant filed in the Superior Court a ice of Motion to Quash Service of Summons, under Section 416.1, e of Civil Procedure. By this act, Superior Court jurisdiction was ended by operation of law, pending determination of the Motion to ush, and thus cancelling and annulling the hearing set for July 28, 1964. h basis for the Motion to Quash was the insufficiency of the complaint e's Declaration for Order to Show Cause in re Contempt) in failing tate facts constituting the necessary elements of a contempt.

On July 28, 1964, Appellant did not appear for the contempt ing, which could not have been held because of the Motion to Quash. ertheless, Appellee issued a bench warrant (body attachment), brought ellant into his court on July 29, 1964, sentenced him to 3 days in il and committed him to the custody of the Sheriff, who imprisoned in for 3 days.

Appellant filed in U.S. District Court on July 30, 1965, a ivil action for damages against Appellee, alleging false imprisonment, eprivation of Federal rights, conspiracy to deprive of Federal rights, nd failure to prevent such conspiracy. Service of process was effected n August 24, 1965.

Appellee moved on Sept. 10, 1965, to dismiss the action nder Rule 12b(6), Federal Rules of Civil Procedure, for failure to state claim upon which relief can be granted. After hearing on Oct. 11, 1965, e District Judge on that day signed an order sustaining the motion to sniss.

Appellant filed in District Court on Nov. 10, 1965, Notice Appeal of the order sustaining the Motion to Dismiss.

On Oct. 8, 1965, notwithstanding the damage suit against him, ppllee again signed an Order to Show Cause in re Contempt directed

On July 23, 1965, appellant filed in the Superior Court a

g of Motion to Quash Service of Summons, under Section 418.10,

of Civil Procedure. By this act, constitutional jurisdiction was

ected by operation of law, pending determination of the Motion to

, and thus notwithstanding and [illegible] the hearing set for July 28, 196

unds for the Motion to Quash was the insufficiency of the complaint

a Declaration for Order to Show Cause Re (Contempt) in failing

no facts verifying the necessary elements of a contempt.

On July 28, 1965, appellant did not appear for the continued

for which could not have been held because of the Motion to Quash.

ertheless, appellee issued a bench warrant (body attachment), brought

ant into his Court on July 29, 1965, sentenced him to 5 days in

and remanded him to the custody of the Sheriff who imprisoned

5 days.

Appellant filed in U.S. District Court on July 31, 1965, a

ction for damages against appellee, alleging false imprisonment,

ation of Federal rights, conspiracy to deprive of Federal rights.

ature of warrant [illegible]. Service of process was effected

upon [illegible] 3, 1965.

Appellee moved on Sept. 3, 1965 to dismiss the action

Rule 12(b), Federal Rules of Civil Procedure, for failure to state

[illegible] upon which relief can be granted. After hearing on Oct. 1, 1965,

ict Judge on this day signed an order sustaining the motion to

*Appellant filed in District Court on Nov. 19, 1965, Notice

of an Order sustaining the Motion to Dismiss.

On Oct. 4, 1965, notwithstanding the damage suit against him

[illegible]

ppellant, ordering him to appear on Nov. 24, 1965. On Nov. 23, 1965, ellant filed a Notice of Motion to Quash Service of Summons; he did ppear for the hearing on Nov. 24. Appellee issued a bench warrant which Appellant was arrested early in the morning of Dec. 2, 1965, jailed until 4 P.M. that day, with bail set at $1000. On Dec. 8, 1965. Motion to Quash was granted by another judge, and the contempt pro-ding came to an end, at least temporarily. The two complaints in the 5 and 1965 contempt proceedings were identical in essential wording, both insufficient to charge a contempt.

SPECIFICATION OF ERRORS

The District Judge erred in granting the Motion to Dismiss hastily superficially, without a careful determination of the alleged certainty at granting of relief on the stated claim is impossible.

The District Judge erred in denying an adjudication on the merits te further pleadings and full hearing, in the face of serious, complex, none too well settled questions of law, and on the basis of unwarr-te inferences and presumptions against plaintiff, not against defendant.

) The District Judge erred in assuming, in deciding the matter, that pellee had authority, on the facts of the case, to render valid orders did so with blanket immunity from liability for his acts.

The District Judge erred in presuming, with Appellee's counsel, that y erroneous judicial acts of Appellee were involved, not void judicial ministerial acts for which no immunity from liability can be claimed.

The District Judge erred in absolving Appellee of liability for his act of imprisoning Appellant for disregard of a void order, which regard does not constitute contempt, and for failing to attend a non-stnt hearing which, under the law, could not possibly be held.

[illegible] ordering him to answer to Count [illegible], in Nov. [illegible], [illegible] and also a motion to [illegible] Section of Commission [illegible] for the receiver on Nov. [illegible] Judge issued a bench warrant [illegible] Absolutus was arrested early in the morning of Jan. [illegible], [illegible] with [illegible], brought, with bail set at $[illegible]. On Jan. [illegible] [illegible] to [illegible] was granted by another Judge, but the [illegible] [illegible] Count [illegible] on and, at least temporarily. The two conditions in [illegible] $[illegible] contained provisions also, [illegible] to [illegible] [illegible] [illegible] to claim a violation.

CONCLUSIONS OF LAW

[illegible] District Judge erred in granting the Motion to Dismiss [illegible] preliminary, without a careful determination of the alleged violations [illegible] relief [illegible] in [illegible] proceedings.

[illegible] District Judge erred in denying the motion on the merits [illegible] further [illegible] and [illegible]. In the face of serious [illegible] [illegible] the well settled questions of law, and [illegible] the [illegible] of [illegible] [illegible] and prosecution [illegible] substantial, not [illegible] [illegible]

[illegible] Circuit Judge erred in assuming, in denying the motion, that [illegible] and [illegible], on the [illegible] of the case, to render [illegible] [illegible] with [illegible] immunity from liability for [illegible].

[illegible] Circuit Judge erred in overruling, with [illegible] counsel, the [illegible] [illegible] and [illegible] were involved, not [illegible] [illegible] [illegible] for [illegible] immunity from liability [illegible]

[illegible] Circuit Judge erred in [illegible] [illegible] in liability for his [illegible] [illegible] Appellant for disregard of a [illegible] order, which [illegible] not constitute [illegible], and for failing to attend a [illegible] [illegible] hearing which, under the law, could not reasonably be held

6) The District Judge erred in presuming that judicial immunity exists t all times, even when a judge makes void judicial and ministerial eisions by acting outside the scope of his statutory authority, usurping ower under color of State office and ignoring the limitations imposed by eeral law.

7) The District Judge erred in deciding that redress is not available nder the Civil Rights Act for Appellee's void orders depriving Appellant f his Federal rights, despite the lack of judicial immunity.

SUMMARY OF ARGUMENT

udcial immunity from liability in civil suits for damages is limited to njries arising from erroneous judicial acts, and does not exist where .ii judicial acts (or void or erroneous ministerial acts) constitute the ass for the damage suit. Judicial acts are void when the judge lacks irsdiction of the subject-matter, of the person, or of the particular as; or when he acts without statutory authorization or without regard or necessary procedural prerequisites.

In the case at bar, Appellee had no jurisdiction of the per-on of Appellant, no jurisdiction to proceed in the case or to render the dgnent made, and no statutory authorization to imprison for contempt ndr the circumstances. His acts were void, not erroneous, and carry o mmunity from liability for damages.

A motion to dismiss should not be granted hastily and peficially, by making unwarranted inferences favorable to Appellee, mis-tepreting prior court decisions, and over-simplifying a complex ques-on of law. This suit for false imprisonment and other deprivations of edral rights should not be perfunctorily dismissed on invalid blanket sunptions of immunity. Relief can be granted; Appellee's acts were void.

ARGUMENT

int (1): Judicial immunity from liability for damages limited to erroneous acts within the scope of statutory horization; for void acts, outside the law, liability is less for a judge than for any citizen.

It is not contended in this appeal that Appellee is liable damages as a result of erroneous judicial action within the scope of itory authority, but that he is liable as a result of void acts outside judicial powers and done with only a pretense of legality. Appellee's orandum supporting his motion to dismiss (Clerk's Transcript, p. 9) t 3 Federal and 8 California cases, ALL of them involving decisions were merely erroneous, not void, and therefore are not in point.

> "Where a judge acts in clear absence of all jurisdiction, i.e. of authority to act officially over the subject-matter in hand, the proceeding is coram non judice. In such a case the judge has lost his judicial function, has become a mere private person, and is liable as a trespasser for the damages resulting from his unauthorized acts. Honesty of purpose and sincere belief that (he) was acting in the discharge of his official duty under his oath of office and for the public welfare is not available as a defense. . "

Manning v. Ketcham (1932) 58 Fed. 2nd 948 (CA, 6th)

is Court has expressed agreement in similar language.

> "When a judicial officer does an act in the clear absence of all jurisdiction and knows of the absence of such jurisdiction, his judicial immunity is pierced, but when he merely acts in excess of vested jurisdiction, the general immunity of a judicial officer remains intact..."

Johnson v. MacCoy (1960) 278 Fed. 2nd 37 (CA, 9th)

nt (2): Appellee's acts were void for lack of jurisdic-
on of Appellant's person, the complaint being defective.

The complaint (Declaration for Order to Show Cause in re
rempt) initiating the proceeding was defective in failing to allege that
ellant was able to comply with the order, non-compliance with which
posedly was contumacious. Ultimately, after abandonment of the 1964
empt action and its renewal in 1965 with a similar Declaration, the
prior Court granted Appellant's motion to quash the Order to Show
ue because of the defect in the Declaration. In both proceedings, 1964
d 1965, Appellee attempted vigorously to hold the main contempt hear-
g prior to determination of the motion to quash, and therefore without
e essential jurisdiction of the person of the defendant.

> "If the affidavit filed with the trial court does not state facts sufficient to charge a contempt of court, that court would not have jurisdiction of the person therein sought to be charged with contempt."

Pennell v. Sup. Ct. (1927) 87 Cal. App. 375 at 377

cl of jurisdiction of the person renders the judgment void.

> "A judgment for contempt of court, such as involved here, is as absolutely void, if there was no jurisdiction of the person against whom it was pronounced, as it would be if the court. .imposing the sentence had no jurisdiction whatever of the subject-matter. . . entire lack of jurisdiction of the person is just as fatal to the judgment as entire lack of jurisdiction of the subject-matter. .The absence of either element of general jurisdiction of the subject-matter or person makes void a judgment of a judicial officer."

Pomeranz v. Class (1927) 82 Colo. 173, 257 Pac. 1086

lifornia courts agree that without jurisdiction of the person the judg-

t is void and the judge is liable for damages.

"The record of the proceedings in the case shows that no jurisdiction had been acquired of the person of the plaintiff, and the judgment was therefore, as to him, coram non judice. The judgment being a nullity, the only remaining question is as to the liability of the (appellee), and on this point we have as little doubt as on the other."

Inos v. Winspear (1861) 18 Cal. 397

"If a judicial officer has no jurisdiction of the person, the officer acts as an individual and not as an officer."

Ceinar v. Johnston (1933) 134 Cal. App. 166

fect, there was no valid Order to Show Cause, Appellant was not oe the court for any purpose, and service of process had not occurred.

"It is admitted, that the service of process, or notice, is necessary to enable a court to exercise jurisdiction in a case; and if jurisdiction be taken, where there has been no service of process, or notice, the proceeding is a nullity. It is not only voidable, but it is absolutely void."

Walden v. Craig's Heirs (1840) 39 U.S. (14 Pet.) 147 at 154

it (3): Appellee's acts were void for lack of jurisdicn of the subject-matter for the particular case at bar.

Whether a judge has jurisdiction of the subject-matter is ermined by the nature of the case and the statutes conferring and limg his authority.

"By jurisdiction over the subject-matter is meant the nature of the cause of action and of the relief sought; and this is conferred by the sovereign authority which organizes the court, and is to be

sought for in the general nature of its powers, or in authority specially conferred. . The power to render the decree or judgment which the court may undertake to make in the particular cause, depends upon the nature and extent of the authority vested in it by law in regard to the subject-matter of the cause."

Cooper v. Reynolds (1870) 77 U.S. 308 at 316 (10 Wall.)
"Jurisdiction of the subject-matter is the power to deal with the general subject involved in the action, and is conferred upon the court by law."

Glacken v. Andrew (1918) 69 Okl. 61, 169 Pac. 1096
"Jurisdiction of the subject-matter is the power to deal with the general subject involved in the action. In other words, the court must have cognizance of the class of cases to which the one to be adjudicated belongs."

Craig, Ex parte (1922) 282 Fed. 138 (CA, 2nd)
ha is the 'general subject involved' in the case at bar? Not 'contempt', lon, as the law limits the court's jurisdiction to 'contempt proceedings hich no motion to quash the service of summons has been filed'.
ction 416.1, Code of Civil Procedure, suspends jurisdiction:

"Any defendant. . upon whom service of summons has been made may serve and file, on or before the last day on which he is required to plead . . a notice of motion to quash the service of summons, upon the ground of lack of jurisdiction of the court over him. . In the event of the service and filing of such motion, the time of the moving party to plead to the complaint . . shall be extended, and no default may be entered against him, until the expiration of 10 days following service upon him of written notice of entry of an order of the court denying the motion . . ."

ig of the Notice of Motion to Quash on July 27 automatically extended time to plead to the complaint, thus prohibiting by operation of law scheduled hearing of July 28, and suspending the jurisdiction of the over this class of contempt proceedings pending determination of the on to quash. The bench warrant of July 28, the hearing of July 29, the commitment of Appellant to jail for 3 days were all unlawful, as uly 28 and 29 the court had no jurisdiction of the subject-matter and s not authorized to proceed. Appellee's punishment of Appellant for non-ance at a hearing which the law forbade to be held was unlawful.

"It is urged...that he had authority to punish the plaintiff for contempt, although he had no jurisdiction to try the principal case before him. But the answer to this suggestion is obvious. The power to punish for contempt is only incidental to the more general and comprehensive authority conferred on a magistrate, by which he is empowered to exercise important judicial functions. . . But it is only when he is in the proper exercise of his judicial functions, that this power can be exercised. If he has no jurisdiction of a cause, he cannot sit as a magistrate to try it, and is entitled to no protection while acting beyond the sphere of his judicial power. His act is then extrajudicial and void. His power and authority are commensurate only with his jurisdiction. If he cannot try the case, he cannot exercise a power which is only auxiliary and incidental. There can be no contempt, technically speaking, where there is no authority. In the case at bar, the defendant had no more power to entertain jurisdiction of the complaint . . than any other individual in the community. Although he acted through mistake, it was nevertheless a usurpation. The plaintiff therefore could not have been guilty of contempt toward the defendant in his cap-

acity as a magistrate, while trying a cause of which he had no jurisdiction; and the commitment therefor was unauthorized and void."

Piper v. Pearson (1854) 2 Gray (18 Mass.) 120, 61 Am.Dec.438

pellee therefore lacked lawful authority to h ld the main contempt ering as originally scheduled by the Order to Show Cause, or to pun- l Appellant for his non-appearance at that time.

int (4): Jurisdiction of the particular case is essen- l to a valid judgment, in addition to jurisdiction of person and subject-matter.

he term 'subject-matter' is given a broad meaning, the rule some- s stated, that jurisdiction of person and subject-matter suffices to e the judgment no more than erroneous (never void), must be revised, llow for further statutory limitations.

"This court has held that jurisdiction embraces three essential elements: (1) jurisdiction of the subject-matter, (2) jurisdiction of the person, and (3) jurisdiction of the particular case."

State v. Reeves (1955) 234 Ind. 225, 125 NE 2nd 794

". . a court in acquiring jurisdiction must not only have jurisdiction of the parties and the general subject of the controversy, but . .must have jurisdiction of the subject-matter of the particular case. . A failure to comply with the statute is jurisdictional. . "

Ballman v. Duffecy (1952) 230 Ind. 220, 102 NE 2nd 646

or the court to have 'jurisdiction of the particular case', it must obe e statutory limitations specially applicable to that case, and thus hav thority to render the particular judgment given. A court having juris- ction of contempts generally is nevertheless restricted in some cases endering judgment at a time limited by the quashing statute.

"A court has no jurisdiction to hear or determine a case where the type of proceeding . . is beyond the jurisdiction defined for that particular court by statute or constitutional provision. . though the court has jurisdiction over the subject-matter and the parties in the fundamental sense, it has no 'jurisdiction' (or power) to act except in a particular manner."

Abelleira v. Dist. Ct. of Appeal (1941) 17 Cal. 2nd 280

"It is now settled that jurisdiction over the person and subject-matter is not alone conclusive, but that the jurisdiction of the court to . .render the . . judgment that serves as the basis of the imprisonment is a proper subject of inquiry. Stated another way, jurisdiction to render the particular . . judgment in question is deemed as essential as is jurisdiction of the person or subject-matter. . The trial court, although it may have had jurisdiction of the person and subject-matter, had no jurisdiction to convict and sentence the petitioners for offenses based wholly or in part on an unconstitutional statute."

Bell, In re (1942) 19 Cal. 2nd 488 at 532

'h case at bar arose when Appellee undertook to render judgment at . ime when his jurisdiction (if any he had) to do so was suspended erling decision of the motion to quash. To ignore a valid statute is as itl to the validity of the judgment as to utilize an unconstitutional one.

A motion to quash the summons (i.e., the order to show ause) is proper in contempt proceedings.

Grant v. Sup. Ct. (1963) 214 Cal. App. 2nd 15

Parker v. Sup. Ct. (1926) 79 Cal. App. 2nd 618.

'ushing is a proper remedy in either civil or criminal proceedings, ıdr Sec. 416.1, Code of Civil Procedure or Sec. 995-996, Penal Code.

The rule that jurisdiction of the parties and subject-matter ffices to prevent a void judgment may still be salvaged and applied the case at bar correctly by careful restriction of the meaning of ubject-matter' to designate not the general, unlimited class but

". . the class of cases to which the particular case belongs. ."

State v. Wolever (1891) 127 Ind. 306, 26 NE 762

Lovett v. Lovett (1927) 93 Fla. 611, 112 So. 768 at 775

Munday v. Vail (1871) 34 N.J. Law 418

gardless of the definition of 'jurisdiction of the subject-matter', the ndamental requirement is that the court obey statutory limitations etinent to the particular case before it.

"But proceedings outside the authority of the court, or in violation or contravention of statutory prohibitions, are, whether the court have jurisdiction of the parties and subject-matter of the action or proceedings, or not, utterly void. . .The mere fact that the court has jurisdiction of the subject-matter of an action before it does not justify an exercise of a power not authorized by law, or a grant of relief to one of the parties the law declares shall not be granted. If the court may do so under the guise of 'jurisdiction of the subject-matter', then it may commit all sorts of depredations upon the rights of parties, particularly in default cases. 'Jurisdiction of the subject-matter' means, not only authority to hear and determine a particular class of actions, but authority to hear and determine the particular questions the court assumes to decide."

Sache v. Gillette (1907) 101 Minn. 169, 112 NW 386,11 LRA 803

Michel v. Williams (1936) 13 Cal. App. 2nd 198

Vlen 'jurisdiction of the subject-matter' is loosely defined without strict

formity to the law governing the particular case, it may become a leading criterion of judicial immunity from liability.

". . the judicial officer, in order to entitle himself to claim the immunity that belongs to judicial conduct, must restrict his actions within the bounds of his jurisdiction. Jurisdiction has been defined to be 'The authority of the law to act officially in the particular matter at hand' (Cooley on Torts, 417)."

Frazier v. Moffatt (1951) 108 Cal. App. 2nd 379 at 386

h true measure of judicial immunity is not whether the judge had a uisdiction of the subject-matter', arbitrarily defined, but whether he plied with applicable law; if the definition is correct, the two cri-ra are identical.

"Though the court may possess jurisdiction of a cause, of the subject-matter, and of the parties, it is still limited in its modes of procedure, and in the extent and character of its judgments. It must act judicially in all things, and cannot then transcend the power conferred by the law. . .The judgments. . would not be mere erroneous: they would be absolutely void; because the court in rendering them would transcend the limits of its authority in those cases. . ."

Windsor v. McVeigh (1876) 93 U.S. 274 at 282

"Of the essentials to jurisdiction, the first is a court having legal cognizance of the question in controversy. A court is a place where justice is legally administered. This first essential of a legal court being lacking, the defendant has had no trial under the laws of the land. For the same reason it cannot be said that the judgment may be upheld because the judicial officer had jurisdiction of the offense and offender. . A de jure judge of a legally

constituted court can only exercise his jurisdiction in the manner prescribed by law."

Giambonini, Ex parte (1897) 117 Cal. 573

". . the judgment of a state court is void either because that court lacked jurisdiction of the subject matter or of the parties to the action, or because it entered a judgment which it had no power to enter under the law..."

Daniels v. Thomas (1955) 225 Fed. 2nd 795 (CA, 10th)

is evident that Appellee failed to exercise his jurisdiction lawfully, entered a premature and void judgment, committing Appellant to jail a proceeding over which the law gave him no power whatever to act.

int (5): By repeating the same sequence of void acts 1965 as in 1964, after filing of this damage suit had qualified him from further action involving Appellant, ppellee supplied a new cause of action for damages.

ction 170, Code of Civil Procedure, provides in pertinent part that

"No justice or judge shall sit or act as such in any action or proceeding: 1. . . in which he is interested. . ."

nstead of declaring his disqualification as the statute requires and withraving from Appellant's divorce action, Appellee proceeded to sign a econd Order to Show Cause in re Contempt, again based on an insuffcient affidavit; to issue a bench warrant and cause Appellant's arrest r non-appearance at the scheduled contempt hearing, after filing of a ction to quash; and to imprison him falsely for one day on said void ench warrant. Appellee ceased his efforts to bring the main contempt natter to hearing prior to determination of the motion to quash only hen Appellant produced in court an Affidavit of Disqualification.

"Section 170 of the Code of Civil Procedure in emphatic language says that no judge disqualified by reason of his interest therein shall 'sit or act as such in any action or proceeding'. He has no jurisdiction to render a judgment in such an action. . . If, therefore, the judge rendering the judgment was without jurisdiction in the proceeding, his action was a nullity."

Cadenasso v. Bank of Italy (1932) 214 Cal. 562

Johnson v. German-Amer. Ins. Co. (1907) 150 Cal. 336

iqualification under Section 170(1) cannot be waived by a party, but kes all judgments void.

Mayo v. Beber (1960) 177 Cal. App. 2nd 544

"If a judge is disqualified as a matter of law, every order entered by him is void. . . when the facts are without substantial conflict the question of disqualification is one of law. . ."

Briggs v. Sup. Ct. (1932) 215 Cal. 336

o judicial determination of disqualification is required here.

". . a judgment rendered by a disqualified judge is void. . It is true that where the grounds for disqualification are disputed, the facts constituting it must be judicially established by the proper procedure. . .Here, however, there is no dispute, and no facts to ascertain. The ground for disqualification appears on the face of the record, and the disqualified judge declares the fact himself. There would seem to be no escape from the conclusion that the order granting a hearing was void and that the order setting it aside was proper."

Giometti v. Etienne (1934) 219 Cal. 687

eae of court to file a supplementary pleading covering the 1965 acts ppellee will therefore be requested.

oint (6): A motion to dismiss is a drastic remedy, to used only where impossibility of relief is a certainty. smissal on a plea of blanket judicial immunity is not stified in this case, which should be heard more fully.

Summary dismissal on motion of this case appears unjustid, Appellee's judicial immunity being evidently non-existent.

> "A broad holding that all state officials enjoyed immunity would be an improper approach. If courts held that all state officials had immunity from liability under Civil Rights actions for all acts done or committed within the ostensible scope of their authority, this would practically constitute judicial repeal of the Civil Rights Act. Repeal is the responsibility of Congress, not the courts."

Hoffman v. Holden (1959) 268 Fed. 2nd 280 (CA, 9th)

Frther argument on the impropriety of perfunctory dismissal appears n pp. 17-20, Clerk's Transcript, and will not be repeated here.

CONCLUSION

ppellee's acts were void, not merely erroneous, for failure to comply vi applicable law; judicial immunity is absent. The Complaint states a lam upon which relief can be granted. The District Judge's order susaing the motion to dismiss should be reversed, and leave granted to il a supplementary pleading covering a new cause of action.

pil 25, 1966.

Respectfully submitted,

J. Howard Arnold

Appellant, pro se